Supreme Court, U.S.
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No.

# In the
# Supreme Court of the United States

**MICHAEL BONDS,**

*Petitioner,*

v.

**MILWAUKEE COUNTY, et al.,**

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is it constitutional for a public employer to take adverse employment action against a public employee for speech on a matter of public concern that did not discuss the policies or view points of that employer because that employee holds a policy making job?

2. Is it constitutional to consider the policy making characteristics of a public employee's job when balancing the interest of a public employee to speak out on a matter of public concern against a public employer's interest in the efficient performance of its functions when the speech did not discuss the view points or policies of that public employer?

3. Is it constitutional for a public employer to take adverse employment action against its employee for speech on a matter of public concern without first conducting a reasonable investigation to determine the content, context, and circumstances of that speech?

4. Is it constitutional for a public employer to take adverse employment action against its employee for speech on a matter of public concern based on predictions of future disruption and disloyalty that are not objectively reasonable?

## LIST OF PARTIES

The parties to the proceedings before this Court are:

**Petitioner:**

**MICHAEL BONDS**, individually.

**Respondents:**

**MILWAUKEE COUNTY**, a body corporate of the State of Wisconsin created and existing pursuant to Chapter 2 of the Wisconsin Statutes.

**KAREN ORDINANS**, **WILLIAM HART**, and **THOMAS KUZMA**, individually.*

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* The District Court for the Eastern District of Wisconsin dismissed Bonds's complaint against the individual defendants in a decision and order dated December 7, 1998 that resolved the individual defendants' motion for summary judgment based on qualified immunity. This matter proceeded to trial against Milwaukee County only. The district court's judgment in favor of Milwaukee County was the subject matter of Bonds's appeal to the Seventh Circuit.

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## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Michael Bonds, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled matter on March 28, 2000.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 207 F.3d 969 (7th Cir. 2000). On May 23, 2000, the Court of Appeals issued its order denying petitioners' Petition for Rehearing and Rehearing En Banc.[1] Both are reprinted in the appendix hereto. *App. 1-31 and App. 32-33.* The Findings of Fact and Conclusions of Law[2] and the Judgment of the United States District Court for the Eastern District of Wisconsin are reprinted in the appendix hereto. *App. 34-44 and App. 45.*

## JURISDICTION

This matter was commenced in the Circuit Court for Milwaukee County, Wisconsin on August 7, 1997 under 42 U.S.C. §1983 and two state law claims: wrongful termination and intentional interference with a prospective contractual relationship. Milwaukee County removed this matter pursuant to 28 U.S.C. §1441 to the District Court for the Eastern District of Wisconsin. The District Court for the

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[1] A vote of the members of the court of appeals authorized to vote was requested and three judges voted to grant the petition for rehearing en banc. In addition, Judge Cudahy voted to grant the petition for panel rehearing.

[2] The district court adopted Milwaukee County's proposed findings of fact and conclusions of law.

Eastern District of Wisconsin had jurisdiction under 28 U.S.C. §1331 and §1343. On April 20, 1999, after a bench trial, the district court rendered judgment for Milwaukee County on Bonds's 42 U.S.C. §1983 claim.[3]

The Court of Appeals for the Seventh Circuit had jurisdiction over this matter pursuant to 28 U.S.C. §1291. On March 28, 2000, the court of appeals entered a judgment and opinion holding that Milwaukee County's rescission of its job offer to Bonds because of his speech at a public forum on July 26, 1997 did not violate Bonds's First Amendment rights because Milwaukee County's action was justified by its interests in government efficiency and workplace harmony. Judge Cudahy filed a dissenting opinion.

On May 23, 2000, the court of appeals denied Bonds's Petition for Rehearing and Rehearing En Banc.

This Court has jurisdiction to review this matter pursuant to 28 U.S.C. §1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[3] Bonds's two state law claims were dismissed by the district court in a decision and order dated April 20, 1998 that resolved Milwaukee County's first motion for summary judgment. Summary judgment was denied with respect to Bonds's First Amendment/Section 1983 claim. The individual defendants were dismissed from the case in a decision and order dated December 7, 1998 that resolved the individual defendants' motion for summary judgment based on qualified immunity.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

This case involves speech on a matter of public concern by a public employee where the speech did not criticize or discuss the policies or view points of the public employer that took the adverse job action. The district court, following a bench trial, ruled in Milwaukee County's favor and dismissed Michael Bonds's complaint.

Prior to trial, the parties stipulated to damages and causation. Therefore, the sole issue presented for trial was whether Milwaukee County's rescission of a July 23, 1997 job offer to Michael Bonds because of his speech on City of Milwaukee policies at a public forum on July 26, 1997 violated Bonds's free speech rights under the First Amendment to the United States Constitution as enunciated in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). The court of appeals affirmed the district court's judgment, Judge Richard Cudahy dissented.

### A. Background

Bonds[4] was offered employment by Milwaukee County on July 23, 1997 as an Administrative Secretary III-Policy Research Analyst for the Milwaukee County Board of Supervisors. This job involved performing research and analysis for the County Board of Supervisors. The job did not involve the direct formulation or implementation of policy.

Bonds accepted the job offer on July 25, 1997, and tendered his resignation from his position with the City of Milwaukee. His scheduled start date at Milwaukee County was August 11, 1997.

On July 31, 1997, Milwaukee County withdrew its job offer because of a July 27, 1997 article in the Sunday *Milwaukee Journal Sentinel* that reported on Bonds's comments at a forum sponsored by the Community Brain Storming Conference on Saturday, July 26, 1997.

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[4] Bonds holds two masters degrees and a Ph.D. in Urban Studies from the University of Wisconsin-Milwaukee. He has dedicated most of his professional career to public service.

**1. Bonds's Employment at the City of Milwaukee.**

At the time he received the Milwaukee County job offer, Bonds was employed by the City of Milwaukee. His position was Community Development Block Grant Fiscal Analyst-Senior for the Community Development Policy Committee[5] (hereinafter "CDPC").

Bonds did not work for the Mayor or the Common Council directly. Rather, Bonds worked for and reported to Alderman Frederick Gordon, the Vice Chairman of the CDPC, and the person who hired Bonds. Bonds's job was to provide Alderman Gordon and the CDPC with independent and critical analysis as a check on the recommendations of the Mayor and the Community Block Grant Administration. Bonds had considerable expertise in the Community Development Block Grant funding process which is a highly complex process involving the inner workings of various layers of government bureaucracy.[6]

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[5] The CDPC is a committee comprised of Milwaukee aldermen and members of the city administration. The purpose of the committee is to review, analyze, and make recommendations regarding the distribution and allocation of millions of dollars in Community Development Block Grant funds that the city receives annually from the federal government. In general, the Mayor's Office, through the Community Block Grant Administration, an arm of the mayor's administration, would make recommendations regarding funding allocations to the CDPC. The CDPC would then consider and approve funding allocations and these recommendations would then be considered and approved by the full common council. The mayor would then have the opportunity to either approve or veto the common council's action.

[6] Bonds's doctoral dissertation prepared in connection with his Ph.D. candidacy was entitled *Vanishing Hope: Race, Politics and the Distribution of Community Development Block Grant (CDBG) Funds in Milwaukee, 1975-1997.*

In the spring of 1997, the Mayor proposed a new method for the distribution and allocation of Community Development Block Grant funds known as "Neighborhood Strategic Planning". This new approach generated intense debate both within city government and in the community at large.

Bonds was directed by Alderman Gordon to analyze the Neighborhood Strategic Planning process and prepare a written report. This report was highly critical of the Neighborhood Strategic Planning process. Alderman Gordon agreed with Bonds's criticism of the Neighborhood Strategic Planning process.

**2. The Appearance at the Community Brain Storming Conference Forum.**

In early July 1997, Alderman Gordon was invited to participate as one of several panelists at a forum sponsored by the Community Brain Storming Conference to discuss the Neighborhood Strategic Planning process and other issues relating to Community Development Block Grant policy. The Community Brain Storming Conference is a well established organization that sponsors monthly meetings on social and political issues of importance to Milwaukee's African American community.

Alderman Gordon asked Bonds to appear in his place. Alderman Gordon also told Bonds to provide blunt analysis of the Neighborhood Strategic Planning process at the forum and tell people what they needed to do to get the process changed.

The day before the forum, the Common Council voted to divert certain Community Development Block Grant funds from North Side neighborhoods to South Side neighborhoods as part of the Neighborhood Strategic Planning process. Bonds was also critical of this decision because he felt that it jeopardized racial harmony in Milwaukee and was deceptive.

Michael Bonds attended the Community Brain Storming forum on July 26, 1997, held at a church on a Saturday morning, in place of Alderman Gordon. He made a presentation that recited the findings of his written report prepared at the direction of Alderman Gordon and described the impact of the Common Council's funding decision of the previous day. In addition, in response to a question from the audience, Bonds listed some of the actions that citizens could take if they disagreed with the Mayor or Council's policies. However, Bonds did not advocate for any particular course of action.

On July 26, 1997, Bonds did exactly what his boss, Alderman Gordon, asked and expected him to do. He reported on his analysis and criticism of the Neighborhood Strategic Planning process and explained the actions people could take if they disagreed with the Mayor and the Council.

The Community Development Block Grant funding process was, in July, 1997, the subject of intense public interest in Milwaukee. Bonds was one of the foremost experts on this subject. The policies, actions, and view points of Milwaukee County were not discussed at the forum. The subject at issue involved the policies and actions of the City of Milwaukee.

**3. Milwaukee County's Response to Bonds's Speech.**

Karen Ordinans (the County Board Chairperson and ultimate decision maker in the hiring decision at issue here) withdrew Milwaukee County's job offer because of Bonds's speech as reported in the *Milwaukee Journal Sentinel*. *F of F, #17 & 18; App. 39-40.* However, Karen Ordinans was not present at the forum; did not speak to anyone who was present; did not talk to Bonds about his actual comments or the circumstances under which they were made; and did not talk to his boss, Alderman Gordon.

Three County Supervisors complained to Ordinans (the County Board consists of 25 supervisors) about Bonds's comments as reported in the newspaper. However, none of these Supervisors were present at the forum nor did they speak to anyone who was present, or speak to Bonds about his actual comments or the circumstances under which they were made. None of these Supervisors talked to Bonds's boss, Alderman Gordon.

However, at least six other County Supervisors did not find Bonds's appearance at the forum or his reported comments to be inappropriate. Five of these County Supervisors, as members of the County Board's African American Caucus, signed an August 7, 1997 letter urging Ordinans to reconsider her decision to withdraw the County's job offer.

**4. The City of Milwaukee's Response to Bonds's Speech.**

Following Milwaukee County's withdrawal of Bonds's job offer on July 31, 1997, Bonds was allowed to continue in his position as Fiscal Analyst-Senior to the CDPC for the remainder of 1997. This position was eliminated in early 1998 and Bonds was transferred to the City's Legislative Reference Bureau (the research arm of the Common Council) as a Policy Analyst. In April, 1998, Bonds received a substantial pay raise. At all relevant times, Bonds was an exempt or at-will employee with the City. He had no civil service or other job tenure protection. The City could have terminated Bonds at any time or refused to allow him to return to his job after he tendered his resignation. Bonds was never disciplined or reprimanded by the City of Milwaukee because of his comments or appearance at the July 26, 1997 forum.

**B. Decision in the Court of Appeals**

In affirming the district court's judgment, the court of appeals held that Bonds's July 26, 1997 comments was

speech on a matter of public concern (disagreeing with the district court, *C of L, #2; App. 16-17*), but that under the *Pickering* balancing test, Milwaukee County's action was justified because the County's interest in government efficiency and workplace harmony outweighed Bonds's interest in speaking. The court of appeals also held that the so called "policy maker" exception did not form a basis for rescinding the job offer (again disagreeing with the district court, *C of L, #6; App. 43*) because Bonds's comments did not implicate Bonds's politics or any Milwaukee County policies. However, the court of appeals also found that the policy making status of Bonds's Milwaukee County job weighed decisively in the County's favors in striking the *Pickering* balance.

## REASONS FOR GRANTING THE WRIT

### A. Introduction

This case stands out from the broad array of fact intensive public employee/free speech cases because of the following four factors:

1. The importance of the speech on a matter of great public concern.

2. The speaker's knowledge of and expertise in the subject matter.

3. The fact that Bonds's speech did not discuss or criticize any Milwaukee County officials or Milwaukee County policies or view points.

4. The fact that Milwaukee County did not conduct a meaningful investigation into the content, context, or circumstances of the speech before deciding to take adverse employment action.

These four factors bring into clear focus the central issue which is the extent to which public employers can prevent/

punish the speech of policy making employees[7] on matters of public concern when that speech does not criticize or discuss the policies, view points, or actions of that public employer but the policies of another unit of government. The answer to this question has profound consequences for public employees and for the public at large because this decision stands for the proposition that public employers enjoy wide latitude, and perhaps the absolute right, to prevent/punish the speech of certain categories of employees on any subject of public concern and, therefore, wide latitude to constrain the information that well informed and experienced pubic employees (usually those in policy making jobs) can convey to the public on any subject.

In addition, this decision brings into clear focus the junction between two distinct lines of First Amendment jurisprudence of this Court when the speech of high level or policy making employees is at issue. Since this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court has consistently held that the right of public employees to speak out on matters of public concern was to be determined according to a balancing test that

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[7] Bonds has generally conceded that the Milwaukee County job had at least some policy making characteristics although his job would certainly lay at the low end of the spectrum of those jobs which court's have held constitute policy making positions. *See*: *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998) (airport manager); *Moran v. State of Washington*, 147 F.3d 839, 849-851 (9th Cir. 1998) (Deputy Commissioner of Consumer Advocacy in Office of Insurance Commissioner); *Weisbach v. County of Los Angeles*, 119 F.3d 778, 783-84 (9th Cir. 1997) (Medical Director of the Dept. of Health Services); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995) (Controller of the County Dept. of Administration); *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992) (en banc), *cert. denied*, 504 U.S. 941 (1992) (school superintendent); and *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988) (university athletic director).

weighed the government's interest as an employer to prevent or punish employee speech against the employee's interest in speaking. However, since this Court's decision in *Elrod v. Burns,* 427 U.S. 347 (1976), this Court has consistently held that the employment of high ranking or policy making public employees can be conditioned on political loyalty and party affiliation without violating the First Amendment rights of those employees. *Pickering* postulated a balancing test while *Elrod* set forth a categorical test.

In this decision, the court of appeals has adopted a de facto categorical approach to determining the free speech rights of high level or policy making employees because the court of appeals held that a policy making employee like Bonds can be punished for speech on matters of public concern even though that speech does not criticize the policies, actions, or view points of that employee's employer. The court of appeals held that certain classes of public employees can be punished for any act of speech or expressive conduct regardless of content, substance, or view point because of the type of job they have.

If it is the law of the United States that policy making employees enjoy little if any First Amendment protection to speak out on any matters of public concern as the *Bonds* majority apparently believes, and that such employees can be disciplined for speech in the same way they can be disciplined for political affiliation under *Eldrod,* then this Court should declare this evolving principle of First Amendment jurisprudence. Public employees need to know whether their job status or the *Pickering* balancing factors will determine the parameters of their free speech rights.[8]

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[8] Clarification by this Court will reduce the volume of litigation in the area of public employee free speech since high ranking or policy making employees will know that their job position gen-

(continued...)

Moreover, the court of appeals has declared in clear and certain terms that a public employee's free speech rights are inversely related to the value of the information that employee can impart to the public. A low level city janitor with little insight on the inner workings of government has broad rights while the employee that is in a position to know what ails government and can provide useful and meaningful information to the electorate to advance the process of self government has narrow or non-existent rights. As such, the First Amendment value of promoting and facilitating self government, which this Court has repeatedly stated is one of the core principles of the Free Speech Clause,[9] has been stood on its head under this decision—the more self government would benefit from public employee speech the more government, as an employer, has the right to stifle that speech. Few, if any, lower court decisions have declared this rule so clearly.

Therefore, review is necessary to (i) bring the Seventh Circuit into conformity with this Court's jurisprudence; (ii) reconcile and settle conflicts among the circuits; (iii) determine whether the free speech rights of policy making employees is to be determined according to a balancing approach or a categorical approach; and (iv) affirm that public employee speech on matters of public concern is vital

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(...continued)
erally precludes public speech or expressive conduct. Litigation will instead focus on the job duties of the employee rather than fine distinctions about what constitutes a "matter of public concern" and open ended balancing of a limitless variety of factors favoring and disfavoring employee speech.

[9] *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 344-347 (1995); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *Bond v. Floyd*, 385 U.S. 116, 135-137 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964); *Roth v. United States*, 354 U.S. 476, 484 (1957).

to self government and the public's right to information concerning the ever expanding functions of the bureaucracies and agencies that govern our lives.

### B. Under the Balancing Approach of *Pickering v. Board of Education*, this Matter Should have been Decided in Bonds's Favor.

Judge Cudahy's dissent notes that "Pickering sounds very much like the present case." *Bonds v. Milwaukee County*, 207 F.2d 969, 983-984 (7th Cir. 2000); *App. 22*. Judge Cudahy is right, however, the court of appeals majority reached a different result than *Pickering*.

*Pickering v. Board of Education*, 391 U.S. 563 (1968) established that a public employee cannot, consistent with the Free Speech clause of the First Amendment, be terminated or otherwise retaliated against by his/her employer for commenting upon matters of public concern unless the interest of the employee, as a citizen, in commenting on a matter of public concern is outweighed by the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees. *Id.*, at 568-569.

In *Pickering*, a public school teacher wrote a letter to a newspaper criticizing the school board's allocation of public funds. *Id.*, at 569. After a "full hearing", the school board fired Pickering having determined that the letter was "'detrimental' to the efficient operation and administration of the schools of the district and hence . . . that interests of the schools require(d) (his dismissal)." *Id.*, at 564-565.

Here, Bonds made a speech at a public forum criticizing the Community Development Block Grant funding policy of the City of Milwaukee. As in *Pickering*, Milwaukee County concluded that Bonds's speech indicated he would, in essence, be detrimental to the "efficient operation and administration" of Milwaukee County. Unlike *Pickering*, Milwaukee County did not conduct a "full hearing" before dismiss-

ing Bonds and Bonds did not criticize Milwaukee County, the employer who took the adverse job action, but criticized the policies of another unit of government.

Finding that Pickering's dismissal violated his First Amendment rights, the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.*, at 574.

In reaching this result, the Court noted that Pickering's speech was "in no way directed towards any person with whom appellant [Pickering] would normally be in contact in the course of his daily work as a teacher." *Id.*, at 569. Therefore, the Court found that "no question of maintaining either discipline by immediate superiors or harmony among co-workers is present here." *Id.*, at 570.

In the present case, Bonds's speech was not directed at anyone with whom he would "normally be in contact in the course of his daily work" as a Research Analyst for the Milwaukee County Board. Again, Bonds spoke about the policies and officials of the City of Milwaukee.

The *Pickering* Court found that issues involving the allocation of public funds are questions on which "free and open debate is vital to informed decision making by the electorate." *Id.*, at 571-572. The *Pickering* Court went on to state that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572.

Similarly, in the present case, Bonds was a member of the community who had "informed and definite opinions" on a question (Community Development Block Grant policy) that

involved the allocation of public funds. Accordingly, like Pickering, it is "essential" that Bonds "be able to speak out freely on such questions without fear of retaliatory dismissal."

Bonds's offending speech falls squarely within the scope of speech by a public employee that this Court held cannot form a basis for dismissal. As in *Pickering*, the present case is a case "in which the fact of employment [with Milwaukee County] is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher" and therefore, "it is necessary to regard the teacher as the member of the general public he seeks to be." *Id.*, at 574. The subject matter of Bonds's speech was, at best, only "tangentially and insubstantially" related to his prospective Milwaukee County employment. As such, from Milwaukee County's perspective, Bonds was speaking as member of the general public when he gave his remarks on July 26, 1997. Finally, as in *Pickering*, Bonds's offending speech did not occur in the Milwaukee County work place.

Therefore, the court of appeals majority opinion is inconsistent with *Pickering*.

At this point, Milwaukee County will argue that the *Bonds* majority drew a distinction between *Pickering* and the present case based on the fact that Bonds's future Milwaukee County job was a policy making position and therefore greater weight needs to be given to Milwaukee County's concern about efficiency and workplace harmony. While the court of appeals said that the policy maker exception articulated in this Court's line of cases beginning with *Elrod v. Burns,* 427 U.S. 347 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980) did not justify Milwaukee County's adverse job action on a per se basis, the court did hold that the policy making aspects of Bonds's future job "swings the [Pickering] balance in the County's favor." *Bonds*, 207 F.3d at 981; *App. 18*. In essence, the court of

appeals' decision turned on its conclusion that Bonds's policy making status was "a critical factor in applying the Pickering balancing." *Bonds*, 207 F.3d at 981; *App. 18*. The majority went on to say that free speech protection should only be accorded to that speech by policy making employees **"that bears almost no relation to the demands required of policymaking employees"** (emphasis added) *Bonds*, 207 F.3d at 982; *App. 19*. This amounts to establishing a categorical approach to the free speech rights of policy making employees.

However, decisions in other circuits that have considered an employee's policy making status in striking the *Pickering* balance in the employer's favor have all done so in the context of speech that directly criticized the policy, view point, or action of the employer. *Bonds* is the only reported decision where the policy making status of the employee was considered in striking the *Pickering* balance in favor of the employer in the context of speech that did not implicate or criticize the policies or view point of the public employer taking the adverse job action.

### 1. Other Circuits have Held that the Policy Making Status of a Public Employee's Job is not a Factor in the *Pickering* Balancing Analysis When the Speech did not Implicate the Policies or View Points of the Public Employer Taking the Adverse Job Action.

*Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988) involved the termination of a university athletic director (Hall) because he disagreed with the policies of the university's president. The court held that Hall's speech involved matters of public concern, but concluded that "Hall could be dismissed for expressing views on matters within the core of his responsibilities that reflected a policy disagreement with his superiors such that they could not expect him to carry out their policy choices vigorously." *Id.*, at 311.

In reaching this result, the court of appeals found that Hall's status as a policy making employee justified the termination. The court explained its methodology in the policy making/*Pickering* balancing context as follows:

> We will ask first whether the employee's position relates to an area as to which there is room for principled disagreement on goals and their implementation. [citations omitted] In other words, is it a policy area? If so, we then ask whether the office gives the employee broad responsibilities with respect to policy formulation, implementation, or enunciation. Put differently, was the individual a policy level employee? If both criteria are met, we ask whether the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employees speech. [citations omitted] **At a minimum, the employee speech must relate to policy areas for which he is responsible**. [emphasis added]

*Id.* at 310.

Since Hall was found to be a policy making employee, the court held that "[t]he University had a significant interest in ensuring that Hall was, perceived to be, compatible with the President and Board." *Id.* at 310. The court went on to state that "Hall's speech directly interfered with this interest, as he engaged in a pattern of opposition to the policies of his superiors." *Id.* at 310.

Had *Bonds* been decided by the D.C. Circuit under *Hall*, the outcome would have been different because in *Bonds*, the speech did not "relate to policy areas for which he [Bonds] is responsible" in his Milwaukee County job, and Bonds did not "engage in a pattern of opposition to the policies of his superiors." In *Hall*, the D.C. circuit held that the speech must relate to the job responsibilities of the policy maker. In *Bonds*, the majority held that policy maker considerations will be considered in connection with any and all public employee speech. *Bonds* therefore conflicts

with *Hall* and represents a substantial diminution of public employee free speech since, under *Bonds*, a policy making employee can be punished for speech on any subject of public concern.

### 2. Other Courts of Appeals that have Considered Policy Making Factors in Striking the *Pickering* Balance in Favor of the Employer have all Done so in the Context of Employee Speech that was Critical of the View Point or Policy of the Employer Taking the Adverse Job Action.

*Hall*, not *Bonds*, is consistent with the decisions in other circuits that have applied policy maker considerations in striking the *Pickering* balance in favor of the employer.[10] In all of the following cases in which the employer prevailed,

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[10] In *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986), the Fifth Circuit ruled in favor of a policy making employee (the executive director of a community action agency) on his First Amendment retaliatory discharge claim finding that the employee's interest in speaking out on a matter of great public concern outweighed the employer's concerns about loyalty and the impact of the speech on close working relationships. Significantly, the employee in Gonzalez directly criticized the actions of the public body he reported to.

A recent court of appeals decision also ruled in the employee's favor in a situation where the employee was found to be a policy maker but the speech did not involve the employer's politics or substantive policy position. In *Barker v. City of Del City*, ___ F.3d ___, 2000 WL 771767 (10th Cir. June 15, 2000), the court vacated summary judgment in favor of the employer on the employee's (the employee was the Administrative Assistant to the City Manager) First Amendment retaliatory discharge claim because the employer had not presented sufficient evidence that the employee's speech on matters outside of her employment responsibilities (speech to a newspaper reporter about an open meeting law violation) was disruptive.

the speech at issue was critical of the policies, actions, or view points of the public employee's employer: *Lewis v. Cowen*, 165 F.3d 154, 163-166 (2nd Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 700 (1999); *McVey v. Stacy*, 157 F.3d 271, 277-279 (4th Cir. 1998); *Moran v. State of Washington*, 147 F.3d 839, 849-851 (9th Cir. 1998); *Flynn v. City of Boston*, 140 F.3d 42, 47-48 (1st Cir. 1998), *cert. denied*, 525 U.S. 961 (1998); *McEvoy v. Spencer*, 124 F.3d 92, 98-104 (2nd Cir. 1997); *Weisbach v. County of Los Angeles*, 119 F.3d 778, 783-84 (9th Cir. 1997); *Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119-120 (5th Cir. 1996); *Bates v. Hunt*, 3 F.3d 374 , 378 (11th Cir. 1993); and *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992) (en banc), *cert. denied*, 504 U.S. 941 (1992).

In all the cases, other than *Bonds*, where the courts of appeals have considered policy making factors in striking the *Pickering* balance in favor of the public employer, the public employer was concerned with the substance of the employee's speech or expressive behavior—that the view point expressed was contrary to the employer's decision, action, or policy in a particular area. However, in the present case, Milwaukee County was only concerned with the fact that Bonds spoke—on any subject. Karen Ordinans did not take issue with the substance of Bonds's comments. The majority decision in *Bonds* noted that "[t]he County concedes that Bonds's substantive viewpoint on the NSPP was basically untroubling, given its distance from the development and implementation of the program." *Bonds*, 207 F.3d at 978; *App. 12*.

At this point Milwaukee County will no doubt argue that it was not the fact that Bonds spoke out on any subject that justified its adverse job action, but that Bonds spoke out in a way that demonstrated disloyalty and insubordination to his City of Milwaukee employer. However, as will be demonstrated below, Bonds's comments were not disloyal or insubordinate to his boss, Alderman Gordon, and the City

took no adverse job action against Bonds. Thus, it is indeed the act of speech—on any subject—that drove Milwaukee County's concerns. Milwaukee County simply did not want to employ someone who got his name in the paper regardless of the subject matter.

The implication for the First Amendment is that, under *Bonds*, any act of speech or expressive conduct on any subject of public concern will expose policy making employees to adverse employment action. The employee's job status will become determinative—a categorical test. Therefore, this decision conflicts with decisions in other circuits and conflicts with decisions of this Court under the *Pickering/Connick*[11] line of cases.

Perhaps policy making employees should have no right to speak out on any subject of public concern because of the need for loyalty and trustworthiness in high level government jobs. In other words, "going public" or "getting your name in the paper" in connection with any subject interferes with the need for loyalty and trustworthiness on a per se basis.[12] However, at present, the law among the circuits, except for the Seventh Circuit in *Bonds*, draws the line at speech that criticizes the policies or view points of the employer. *Bonds* goes beyond that line.

If *Bonds* is right and the other circuits are wrong, this Court should clarify this conflict for the benefit of all public

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[11] The *Pickering* Court took notice of the possible impact of policy making considerations in striking the Pickering balance but premised its discussion on the fact that the confidential or policy making employee's speech criticized his/her employer's actions or policies. *Pickering*, 391 U.S. at 570, n. 3.

[12] Judge Easterbrook in his concurring opinion in *Wilbur v. Mahan*, 3 F.3d 214, 221 (7th Cir. 1993) essentially called for a categorical approach to determining the free speech rights of high level policy making employees.

employers and employees. If *Bonds* is wrong, this conflict should be corrected for the benefit of public employers and policy making employees in the Seventh Circuit who now have no free speech rights unless their speech has no relationship to the demands of their job.

### C. The *Bonds* Decision is Contrary to this Court's Decision in *Waters v. Churchill.*

In *Waters v. Churchill,* 511 U.S. 661 (1994) a plurality of this Court held that in the public employee/free speech context, public employers must conduct a reasonable investigation into what a public employee said, the context in which it was said, and why it was said before it can retaliate against that public employee for his/her speech. *Waters* also requires that a judgment by a public employer about the future harm of an employee's speech must have some basis in fact, and may not be based on mere speculation or an inaccurate assessment of what actually happened and why. In other words, a public employer's predictions of future harm and disruption must be objectively reasonable. The plurality stated that the appropriate test is "the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case." *Id.*, at 678.

The *Bonds* majority correctly determined that Milwaukee County's predictions of future harm had to be reasonable. However, in actually finding those predictions reasonable, the majority sanctioned reliance on rank speculation by a public employer about the future consequences of public employee speech.

Judge Cudahy's dissent squarely addressed this shortcoming. He stated:

> The fundamental error that I see in the majority's analysis is in taking the expressed concerns of County

> officials at face value without requiring some showing that subjective concerns were supported by objective reality. . . . Potential problems may certainly figure in the Pickering analysis, but there must be some plausible link between what has happened in the real world and what might happen in the future. [citations omitted] Here we have a single episode in which a speaker may have engaged in rhetorical excesses. This may indicate a too fervent commitment to a point of view, but it is pure speculation that 'workplace dissension' is anywhere in sight. The majority theorizes that the small size of the County staff would contribute to bad working relations with Mr. Bonds. This is just a wild guess based on a single speech.

*Bonds*, 210 F.3d at 985-986; *App. 26-27*.

The *Bonds* decision is, therefore, contrary to *Waters* and conflicts with decisions in other circuits.

**1. Decisions in Other Circuits have Shown a Strong Aversion to Accepting Rank Speculation About the Future Consequences of Public Employee Speech.**

*Hubbard v. Environmental Protection Agency*, 949 F.2d 453 (D.C. Cir. 1992), *rev'd on other grounds*, 982 F.2d 531 (D.C. Cir. 1992) (en banc), involved an applicant (Hubbard) for a criminal investigator position with the Environmental Protection Agency ("E.P.A."). In the course of Hubbard's prior employment as a detective with the District of Columbia Metropolitan Police Department he had engaged in certain speech activity that the court found to be a subject of public concern. When the E.P.A. learned of this activity it decided not to hire Hubbard even though he was their top candidate. The court held that the E.P.A. passed Hubbard over in violation of Hubbard's free speech rights under *Pickering*.

The E.P.A. refused to hire Hubbard because the hiring official had a "gut feeling" that Hubbard lacked sensitivity

to the proper handling of sensitive information in on going investigations based on the prior incident of speech and that Hubbard had had improper contacts with the press in connection with his prior speech. None of Hubbard's speech activity involved any officials or policies of the E.P.A. but related to a drug investigation while Hubbard was a detective. The E.P.A. argued that this information justified its adverse job action because Hubbard's prior speech activity, in essence, demonstrated that if he were given a job at the E.P.A. he would engage in actions that could be disruptive, insubordinate, and damaging to morale and discipline. The E.P.A. relied on its predictions of Hubbard's future behavior to justify its adverse job action—an argument that is identical to Milwaukee County's in the present case that was accepted by the court of appeals majority.

However, the Hubbard court struck the *Pickering* balance in Hubbard's favor. The court stated that "it is clear that 'unadorned speculation as to the impact of speech . . . on the government's enterprise will not suffice.' [citations omitted] In this case, Hubbard was denied a job solely on the basis of Beacon's 'unadorned speculation' about Hubbard's supposed press contacts." *Id.*, at 285.

The court found it significant that, like the present case, Hubbard had been authorized by the D.C. Police Department to engage in his prior speech activity, had not been found to be insubordinate by the D.C. Police Department in connection with this speech and was never disciplined by the D.C. Police Department for any improper conduct during the investigation in which the offending speech occurred. *Id.*, at 284-285. In short, like the case here, Hubbard's speech was not found to be disruptive or insubordinate by his then employer whose interests were directly implicated by Hubbard's speech. In such circumstances, the Hubbard court stated that a prospective employer cannot rely on a prediction of harm and disruption to justify adverse job action when the employer directly implicated by

the speech did not find the employee insubordinate or disruptive. On this point the court of appeals majority in *Bonds* is in direct conflict.

In *Heil v. Santoro*, 147 F.3d 103, 109-110 (2nd Cir. 1998) the court stated that "[s]ubstantial weight must is accorded the government employer's prediction that given speech has the potential for disruptiveness, but its prediction must be reasonable. Thus an employer that has received a report of such speech must make a reasonable investigation before deciding to take action against the employee."

In *Sexton v. Martin*, 210 F.3d 905, 911-912 (8th Cir. 2000), the court stated that

> Before the Court commences the *Pickering* balancing test, however, it is critical to determine whether the defendant has produced sufficient evidence that the speech had an adverse effect on the efficiency of the employer's operation. See *Burnham v. Ianni*, 119 F.3d 668, 678 (8th Cir. 1997). In other words, to put the *Pickering* balancing test at issue, the public employer must proffer sufficient evidence that the speech had a adverse impact on the department. See id. The more the employee's speech reflects matters of public concern, the greater the employer's showing must be that the speech was disruptive before the speech can be punished.

The court went on to state that "'a simple assertion by the employer that contested speech affected morale, without supporting evidence,' is not enough to support a grant of qualified immunity. [citations omitted] Mere allegations of disruption are insufficient to put the *Pickering* balance at issue." *Id.*, at 912.

In *Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989), *cert. denied*, 502 U.S. 906 (1991), the court stated:

> The dissent's assertion notwithstanding, we are not creating a new rule nor are we increasing the quantum

> of proof which the government must carry. We merely recognize what we believe to be an obvious *Pickering* requirement that the government show *some* ascertainable damage to its functioning as a result of the challenged speech. *Accord Roth v. Veteran's Admin*, 856 F.2d 1401, 1407 (9th Cir. 1988); *Connor v. Reinhard*, 847 F.2d 384, 390 (7th Cir. 1988); *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 245 (1988); *American Postal Workers Union v. Postal Services*, 830 F.2d 294, 303 n. 12 (D.C. Cir. 1987). In our view the government cannot prevail in a *Pickering* balance by merely relying on *unsubstantiated* allegations of disruption. Some circuits appear to take the position that a reasonable belief that disruption will occur is sufficient, at least in some circumstances. *See, e.g., Matherne v. Wilson*, 851 F.2d 752, 761 n. 53 (5th Cir. 1988); *Jurgensen v. Fairfax County*, 745 F.2d 868, 879 (4th Cir. 1984); *Waters v. Chaffin*, 684 F.2d 833, 839 n. 12 (11th Cir. 1982). None, however, accept purely speculative allegations. Here, the City made no showing of disruption, or for that matter, potential disruption; only a bald assertion that Mr. Melton's actions in communicating with Page's counsel implicated the City's confidentially interests. [emphasis in original]

*Id.*, at 716, n. 11. *See also*, *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999); *Cragg v. City of Osawatomie*, 143 F.3d 1343, 1347 (10th Cir. 1998); and *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995).

In *Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 932 (2000) the court stated, quoting with approval from *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983), that "'real, not imagined, disruption is required, and the 'close working relationship' exception cannot serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views.'"

In *Brasslett v. Cota*, 761 F.2d 827, 845 (1st Cir. 1985), the court considered the public employer's claim that the em-

ployee's speech "demonstrated a severe lack of judgment that eroded the crucial confidence that the Town Manager must have in department heads." *Id.*, at 845. The court stated

> where First Amendment rights are concerned, 'operational efficiency objections must be real and important before they can serve as a basis for discipline or discharge of a public employee.' [citations omitted] Unless we require that the employer's alleged loss of confidence and trust in his employee be objectively reasonable, public employers could promiscuously offer a subjective justification that could almost never effectively be rebutted.

*Id.*, at 845.

Comparing these decisions with *Bonds*, it is apparent that public employees in the Seventh Circuit face a different standard of proof when their employer claims that their speech is, or is likely to be, disruptive.

### 2. Milwaukee County did not Conduct a Reasonable Investigation.

Based on the standard enunciated in *Waters*, Milwaukee County did not conduct a reasonable investigation into the context and circumstances surrounding Bonds's speech. Milwaukee County's "investigation" consisted of reading the newspaper, listening to the complaints of three of 25 County Supervisors who also relied on what they read in the newspaper, a short phone call between Bill Hart (the County Board's Chief of Staff) and Bonds, and the review of several documents submitted by Bonds to Hart. No hearing or investigation of the type conducted by the employer in *Pickering*, *Connick* or *Waters* was conducted by Milwaukee County.

No one at Milwaukee County talked to Bonds's boss, Alderman Gordon, about Bonds's job duties and responsibil-

ities or why he was at the forum. No one bothered to talk to anyone who actually heard what Bonds said at the forum. Karen Ordinans, the ultimate decision maker, never talked to Bonds about his comments. The three County Supervisors who objected to Bonds's speech never spoke to Bonds about his speech.

As Judge Cudahy pointed out in his dissent:

> What was totally lacking in the Bonds case was any investigation to discover exactly in what context he made his remarks, what was his relation to Alderman Gordon, whether the Alderman directed him to make the remarks on the Neighborhood Strategic Planning Process and a variety of other matters that might reflect on Bonds' alleged "insubordination" and "disruption".

*Bonds*, 210 F.3d at 986; *App. 28.*

Had Milwaukee County conducted a reasonable investigation it would have discovered facts that would have severely undermined its concerns about efficiency and work place harmony because Bonds's speech at the forum was in fact consistent with his employment responsibilities at the City and the views of his boss, Alderman Gordon. Milwaukee County would have discovered that Bonds's actions were consistent with the quality of loyalty and trustworthiness that it so highly valued.

Moreover, with respect to Bonds's alleged comments regarding the actions that citizens could take to change the process, a reasonable investigation would have revealed that these comments were in response to a question from the audience that inquired about what steps citizens could take if they disagreed with the Mayor's program or the Common Council's decision. Bonds listed the available remedies. He did not specifically advocate for any particular remedy—a pointed noted in Judge Cudahy's dissent. *Bonds*, 210 F.3d at 984; *App. 23-24.*

Finally, the reasonableness of Milwaukee County's concerns about what Bonds might do in the future must be measured in light of the actions of the City of Milwaukee. If any unit of government should have had concerns about efficiency, work place harmony, or insubordination, it was the City of Milwaukee.

After Bonds's comments were delivered and the subsequent withdrawal of the county job offer, the City of Milwaukee did not discipline or reprimand Bonds and had no problem allowing Bonds to continue in his job as Fiscal Analyst-Senior to the CDPC. Bonds continued to provide critical analysis and, ultimately, the CDPC accepted Bonds's concerns and modified the Neighborhood Strategic Planning process. His views were essentially vindicated, but at the cost of his county job.

The foregoing observations point out why this Court requires a reasonable investigation into the content, context, and circumstances of speech rather than permitting public employers to rely on "knee jerk" or "gut feelings" that later turn out to be untrue or exaggerated. This is why the plurality in *Waters* stated "it is important to ensure not only that substantive First Amendment standards are sound, but that they are applied through reliable procedures. That is why we have often held some procedures— . . . a particular quantum of proof . . . —to be constitutionally required in proceedings that may penalize protected speech." *Waters*, 511 U.S. at 669, and why Judge Cudahy pointed out in dissent that:

> The alternative to an investigation is to give full credence to every fleeting concern and every vagrant fear felt by officials of the prospective employer when they have read a brief account of an incident in the newspaper. If nothing is required of the prospective employer beyond rampant speculation, the burden on First Amendment rights is unacceptable.

*Bonds*, 210 F.3d at 987; *App. 29*.

While the *Bonds* majority talked about the "reasonableness" of Milwaukee County's judgment, it is patently obvious that the majority defined "reasonable" as whatever Milwaukee County said was reasonable despite undisputed evidence, available at the time of Milwaukee County's decision, that showed that Milwaukee County's judgment was wrong. As such the majority's application of the *Pickering* balancing test conflicts with decisions of this Court and the decisions in other circuits.

### 3. The Degree of Deference to be Accorded a Public Employer's Prediction About Future Harm Arising from Employee Speech on a Matter of Public Concern has Great Constitutional Significance.

The standard for determining when predictions of future disruption, disharmony, and disloyalty will prevail over a public employee's right to speak out and the public's right to hear this information is critical to the protection of fundamental First Amendment interests. If the majority opinion is allowed to stand, public employees in the Seventh Circuit will be effectively denied all First Amendment protections to speak on matters of public concern because there will never be a case that reaches the *Pickering* balancing test where the public employer will not now assert that a public employee's speech on any matter of public concern has the potential to disrupt the smooth functioning of government at some point in the future. It will not matter that the facts do not support this judgment or that the assertion defies common sense. The mere subjective assertion will enable the public employer to prevail. As such, the public employer, not the federal courts, will be the final arbiter of First Amendment rights.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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